

SERVICE DATE - MARCH 10, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-290 (Sub-No. 168X)

NORFOLK AND WESTERN RAILWAY COMPANY—ABANDONMENT  
EXEMPTION—BETWEEN KOKOMO AND ROCHESTER IN HOWARD, MIAMI, AND  
FULTON COUNTIES, IN

Decided: March 8, 2004

By decision and notice of interim trail use or abandonment (NITU) served on May 14, 1996,<sup>1</sup> the Board granted Norfolk and Western Railway Company (N&W) and Central Railroad Company of Indianapolis (CERA) an exemption under former 49 U.S.C. 10505 from the prior approval requirements of former 49 U.S.C. 10903-04 for Norfolk Southern Railway Company (NSR)<sup>2</sup> to abandon 38.4 miles of rail line between milepost I-57.2 at or near Kokomo and milepost I-95.6 at or near Rochester, in Howard, Miami, and Fulton Counties, IN,<sup>3</sup> and for CERA to discontinue service over approximately 51.4 miles of rail line between milepost I-57.2 and milepost I-108.6 at or near Argos, in Howard, Miami, Fulton, and Marshall Counties, IN. In the May 14 decision and notice, the Hoosier Rails-To-Trails Council, Inc.'s and Indiana Trails Fund, Inc.'s (ITF) request for the issuance of a NITU for 38.4 miles of the line segment to be abandoned was authorized only for the line segment between milepost I-57.2 at or near Kokomo and milepost I-74.2 at Peru. The Board stated that, because the abandonment process as to the segment of the line between milepost I-74.2 and milepost I-95.6 could not be completed until IHRC's discontinuance of its trackage rights was authorized, it would not be appropriate for the Board to issue a NITU for that portion of the line. The Board further stated that, to facilitate its action on the request for trail use, NSR must inform the trail user if and when IHRC's trackage

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<sup>1</sup> The May 14 decision and notice also embraced Docket No. AB-289 (Sub-No. 3X), Central Railroad Company of Indianapolis—Discontinuance of Service Exemption—Between Kokomo and Argos in Howard, Miami, Fulton, and Marshall Counties, IN.

<sup>2</sup> Effective September 1, 1998, NSR, through merger, became the successor to N&W. See Norfolk Southern Railway Company—Merger Exemption—Norfolk and Western Railway Company, STB Finance Docket No. 33648 (STB served Aug. 31, 1998).

<sup>3</sup> Indiana Hi-Rail Corporation (IHRC) had trackage rights over a 21.4-mile segment of the line between Peru (milepost I-74.2) and Rochester. IHRC had been operating as a Chapter 11 debtor under the jurisdiction of the United States Bankruptcy Court for the Southern District of Indiana. IHRC filed its bankruptcy petition in In Re: Sagamore National Corporation and Indiana Hi-Rail Corporation, Case No. IP94-08502-RLB-11.

rights were discontinued. The Board reserved jurisdiction to impose a trail use condition if an appropriate request were made following IHRC's discontinuance.

On February 17, 2004, ITF filed a request for a NITU under 16 U.S.C. 1247(d) and 49 CFR 1152.29 for the portion of the line between milepost I-75.5 near Peru and milepost I-95.6 at or near Rochester. ITF submitted a statement indicating its willingness to assume full responsibility for management of, for any legal liability arising out of the transfer of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way, as required by 49 CFR 1152.29, and acknowledged that the use of the right-of-way as a trail is subject to future reactivation for rail service. By letter filed on February 20, 2004, NSR indicates its support for a NITU for the line segment.

NSR states that it notified the trail user of the discontinuance of the trackage rights, did not consummate the abandonment, except for a short segment of the line between I-74.2 and I-75.5, and negotiated a trail use agreement with ITF. NSR conveyed 34.2 miles of the line to ITF by three deeds dated January 21, 1999. NSR states that, although the parties otherwise proceeded in accordance with the terms of the Board's May 14 decision and notice, and the Board was advised of the United States Bankruptcy Court's approval of the IHRC Amended Plan of Reorganization providing for the discontinuance of IHRC's trackage rights, no formal request to issue a NITU for the line segment between milepost I-75.5 and milepost I-95.6 was made in this proceeding. ITF, supported by NSR, now requests that this technical defect in the proceeding be remedied. NSR asserts that, because it negotiated an interim trail use agreement with ITF soon after the bankruptcy reorganization plan and the discontinuance of IHRC's trackage rights had been implemented and confirmed, there was no break in the continuity of the trail use negotiations or period of time where NSR acted with an intent to abandon the subject segment of the line.

Trail use requests may be accepted as long as the Board retains jurisdiction over the right-of-way<sup>4</sup> and the carrier is willing to enter into negotiations. Inasmuch as NSR has not consummated the abandonment of the subject portion of the line and is willing to negotiate for trail use, a NITU will be issued under 49 CFR 1152.29 for the portion of the right-of-way between milepost I-75.5 near Peru and milepost I-95.6 at or near Rochester. The parties may, during the 180-day period described below, negotiate an agreement or confirm an agreement previously reached. If the parties reach a mutually acceptable final agreement, further Board

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<sup>4</sup> See Rail Abandonments—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); Soo Line Railroad Company—Exemption—Abandonment in Waukesha County, WI, Docket No. AB-57 (Sub-No. 23X) (ICC served May 14, 1987); and Missouri—Kansas—Texas Railroad Company—Abandonment—In Pettis and Henry Counties, MO, Docket No. AB-102 (Sub-No. 16) (ICC served Apr. 26, 1991).

approval will not be necessary. If no agreement is reached within 180 days, NSR may fully abandon the line segment. Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. ITF's late-filed request for a NITU under 16 U.S.C. 1247(d) is accepted.
3. Upon reconsideration, the decision and notice served on May 14, 1996, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below, for the portion of the line extending between milepost I-75.5 near Peru and milepost I-95.6 at or near Rochester, for a period of 180 days from the service date of this decision and notice (until September 6, 2004).
4. If an interim trail use/rail banking agreement is reached as to that portion of the right-of-way between milepost I-75.5 near Peru and milepost I-95.6, it must require the trail user to assume for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
7. If an agreement for interim trail use/rail banking is reached by September 6, 2004, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon that portion of the line. See 49 CFR 1152.29(d)(1).

8. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary